Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~78~~ 78-546

HENRY HELSTOSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

HONORABLE H. CURTIS MEANOR,
Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS OF PETITION

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Petition	9
Conclusion	27

TABLE OF CONTENTS OF APPENDIX

Indictment - First four counts	1a
Order of the Court of Appeals denying petition for a writ of mandamus/ prohibition	7a
Order of the Court of Appeals denying petition for rehearing	8a
Unpublished opinion of U.S. District Court Judge Meanor dated February 24, 1977	9a
Order of the Court of Appeals providing for response to mandamus petition	23a

CITATIONS

Cases:

Abney v. United States, 431 U.S. 651 (1977)	9

Cases-continued

	Page
Costello v. United States, 350 U.S. 359 (1955)	21
Doe v. McMillan, 412 U.S. 306 (1973)	13
Dombrowski v. Eastland, 387 U.S. 82 (1967)	12,13
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)	11,12,13
Ex parte Bain, 121 U.S. 1 (1887)	23,24,25
Kilbourn v. Thompson, 103 U.S. 168 (1881)	12
Powell v. McCormack, 395 U.S. 486 (1969)	13
Russell v. United States, 369 U.S. 749 (1962)	23,25
Stirone v. United States, 361 U.S. 212 (1960)	23,25
United States v. Brewster, 408 U.S. 501 (1972)	10,11,13,14 et passim
United States v. Calandra, 414 U.S. 338 (1974)	20,21
United States v. DeFalco, U.S.D.C., D. N.J.	5,6
United States v. Johnson, 383 U.S. 169 (1966)	10,11,12,13 et passim
Weeks v. United States, 232 U.S. 387 (1913)	20

Constitution and Statutes:

United States Constitution, Art. I, Sec. 6 (Speech or Debate Clause)	passim
18 U.S.C., §201	3,4
28 U.S.C., §1254(1)	2

Miscellaneous:

	Page
Newark Star-Ledger, Jan. 10, 1978	8
Washington Post, Jan. 10, 1978	8
2 Works of James Wilson	27

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Henry Helstoski petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case in so far as it denied a petition for a writ of mandamus.

By separate petition, #78-349, the government seeks review by petition for a writ of certiorari from so much of the decision of the Court of Appeals as pertained to an interlocutory appeal from evidentiary rulings adverse to the position asserted by the government. The petitioner herein opposes the government's petition in #78-349 and will in due course file his brief in opposition thereto.

Petitioner respectfully suggests that the major issues in the within petition are closely related to

the issues in #78-349 and that the Court might wish to consider consolidation of the cases for purposes of decision. Such consolidation was in fact ordered by the Third Circuit and it handed down a single opinion which in separate sections resolved the separate but related issues as they emerged in two parallel proceedings: the interlocutory appeal by the government from the evidentiary rulings of the District Court and the petition for a writ of mandamus by the petitioner, seeking dismissal of the indictment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 576 F. 2d 511. The opinion of the District Court is not reported. Both opinions are reprinted in the Appendix filed with the government's petition in #78-349, at 2a and 38a, respectively.

JURISDICTION

The judgment of the Court of Appeals (infra, 7a) was entered on April 13, 1978. The order of the Court of Appeals denying the petitioner's petition for rehearing was entered on June 30, 1978 (infra, 8a).

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Does the United States District Court have jurisdiction to try petitioner on an indictment which on its face charges that as a Member of the Congress of the United States he performed certain specific and identified legislative acts, to wit, the introduction of bills in Congress, with corrupt motivation? Under the Speech or Debate Clause, does not Congress have exclusive jurisdiction to inquire into its Members' performance of legislative acts?

2. May an indictment of a Congressman described above, procured by calling into question before a grandjury the legislative acts of that Congressman, proceed to trial?

3. May an indictment offensive to the Speech or Debate Clause on its face and in the means by which it was procured, nevertheless be prosecuted by forbidding proof at trial of the legislative acts alleged in the indictment? Would not such a trial procedure amount to both an impermissible manipulation of the Speech or Debate Clause and a constructive amendment of the indictment, in violation of the Fifth Amendment right to be tried only upon the indictment voted by a grand jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> *** for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress ***
>
> ***
>
> "official act" means any decision or action on any *** matter *** which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> ***
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act *** [shall be guilty of an offense].

***

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; *** [shall be guilty of an offense].

STATEMENT

On June 2, 1976, a grand jury for the United States District Court for the District of New Jersey handed down an indictment in which petitioner is one of the named defendants. In one conspiracy count and three substantive counts the indictment charges petitioner with the introduction of private immigration bills, specified by beneficiary and date of introduction. The indictment asserts that the bills were introduced pursuant to an agreement to pay moneys and the actual solicitation and/or payment of moneys therefor. The four counts of the indictment are set forth in the Appendix hereto (infra, 1a).

At the time of the indictment and continuously, from 1965 through 1976, petitioner was a Member of the House of Representatives of the Congress of the United States, representing the Ninth Congressional District of New Jersey.

In or about October, 1973, petitioner heard rumors of corruption centering on a former aide who allegedly had participated in the taking of moneys in respect to petitioner's introduction of private legislation. Upon hearing those rumors, petitioner promptly called in the persons who were

the beneficiaries of the legislation and directed them to the FBI (unpublished opinion of the U.S. District Court, 2/24/77, infra, 9a).

The grand jury proceedings herein, so far as concerns the petitioner, commenced some time in April, 1974. At the time, it appeared that Albert DeFalco, the one-time aide, and others associated with him were the chief targets. In fact, DeFalco and some others were indicted in May, 1975, and DeFalco, standing trial alone, was convicted in November of that year of a conspiracy to falsely pretend that he was an aide to the petitioner. That conviction was bottomed upon testimony as to payments of money in respect to private bills introduced by petitioner. At the time of the DeFalco trial, the government made no charge of petitioner's involvement in the conspiracy in which DeFalco was involved. In fact, the theory of the prosecution at the DeFalco trial was that he acted without any authority to speak on behalf of Helstoski and fraudulently represented himself as the Congressman's administrative aide or secretary. 1/

Indeed, in the course of the DeFalco trial the prosecution stipulated on the record that Helstoski was not in on the conspiracy charged to DeFalco

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1/ In its opening in the DeFalco case, the government said:

"It was Mr. DeFalco who pretended to be, although it was not true ... that he was at the time he was dealing with these aliens still the administrative aide to Congressman Helstoski... We will prove to you, of course, that he was not at that time the administrative aide or secretary to Congressman Helstoski ... and that at no time was he authorized to speak on... [Helstoski's] behalf. (Tr., trial, United States v. Albert DeFalco, U.S.D.C., D. N.J., 10/6/75, p. 41; emphasis supplied.)

and the court so ruled. (Tr., DeFalco trial, 10/14/75, pp. 904-906.

The grand jury proceedings continued for over two years, between April, 1974, and May, 1976, during the course of which petitioner appeared 10 times and, at the request of the government and pursuant to subpoena, submitted various materials, including copies of bills and correspondence relating to bills. He testified both voluntarily and in response to subpoena. At no time during all the grand jury proceedings was petitioner ever notified that he was a target. Indeed, when on May 7, 1976, he inquired whether he was, he was informed that his question was "inappropriate" (Tr., grand jury proceedings, 5/7/76, p. 13, C.A. App., 1501.) 2/ Petitioner did not submit to the grand jury any material by way of bills or correspondence relating to bills after his request to know if he was being targetted had been denied.

Though he appeared before grand juries 10 times, the petitioner never appeared before the grand jury which indicted him. This resulted from the manner in which the U.S. Attorney structured the grand jury proceedings. He employed eight grand juries which heard testimony and received documents, and then he selected some portions of that evidence and read it to the ninth grand jury - the indicting grand jury - which also received some additional material but never saw Mr. Helstoski. In the course of this selection process, some extremely significant exculpatory material was culled out (as appears in the opinion of the U.S. Disdrict Court, opinion of Judge Meanor, infra, 9a), while the evidence of petitioner's legislative acts was allowed to remain among the material which went to the indicting grand jury. All these proceedings before the ninth

2/ "C.A. App." designates a five-volume appendix filed by the government in the Court of Appeals.

grand jury occurred in the space of a short period of time and an indictment was produced one week before the 1976 primary election.

While not immediately relevant to the issues on this petition, the Court should know that petitioner has at all times vigorously denied the receipt of any bribe, and asserts that the government, by reason of its own intensive investigation, which included literally hundreds of interviews, is fully aware that in the course of his 12 years of service as a Congressman he assisted thousands of his constituents by numerous acts, including legislative activities, without a suggestion or hint of corruption; that indeed the investigation was instigated by the Congressman himself when he heard rumors of corruption by a former aide; that the U.S. Attorney engaged in a massive program of leaks to the press during the grand jury investigation and then produced an indictment against him one week before a primary election; and that the U.S. Attorney is relying on two or three witnesses, each of whom is beholden to the U.S. Attorney because of deep involvement in criminal activities and each of whom has contrived testimony which, however preposterous and contradicted by objective facts and by the petitioner's impeccable 12-year record, was designed to satisfy the U.S. Attorney's ill-concealed desire to put an end to petitioner's career in Congress; 3/ and the word of such witnesses was

3/ The U.S. Attorney's Office in Newark demonstrated its penchant for indictments of Congressmen on flimsy and unreliable evidence by reaching out to Baltimore and undertaking in the federal court of that city the prosecution of Congressman Garmatz. The prosecution was ultimately dismissed at the request of the government when diligent investigative efforts by defense counsel

[continued on page 8]

made credible to the grand jury by the deliberate exclusion of significant exculpatory evidence.

Before trial, and on or about January 10, 1977, petitioner made a motion to dismiss the first four counts of the indictment on the ground that the same offend the Speech or Debate Clause of the Constitution.

At a pretrial in camera conference on February 1, 1977, the District Court rendered an oral opinion denying the motion to dismiss but it stated it would forbid proof of legislative acts at trial.

Thereafter, the government moved to postpone the trial, which had been scheduled to commence on February 15, in order to pursue an interlocutory appeal. Accordingly, the District Court, which had hitherto withheld its opinion and order on defendant's motion to dismiss, in order to avoid pretrial publicity, filed them on February 22 and February 23, respectively. The opinion, which reiterated what the court had said in camera, is set forth in the appendix to the government's petition in #78-349, at 38a.

The government filed an interlocutory appeal from the evidentiary decision of the District Court. The affirmance of the District Court's evidentiary decision by the Court of Appeals is the subject matter of the government's petition in #78-349.

During the pendency of the interlocutory appeal in the Court of Appeals, petitioner filed in that court a petition for a writ of mandamus/prohibition, seeking an order directing the District Court to

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[Footnote continued from page 7:]
unearthed indisputable evidence that the government's main witness had contrived a story implicating the Congressman in order to cover his own criminality. (Washington Post, 1/10/78, p. 1.) While the U.S. Attorney's Office in Newark announced it would investigate the government witness (Newark Star-Ledger, 1/10/78), no indictment has to this date been announced.

dismiss the indictment on the grounds that the indictment offended the Speech or Debate Clause and the court lacked the jurisdiction to try it. 4/ Petitioner also moved for the consolidation of the interlocutory appeal and the mandamus petition. The Court of Appeals ordered the mandamus petition briefed and, as noted above, it consolidated the two proceedings for disposition, after providing for the filing of a response to the petition (infra 23a).

After consolidated argument, the Court of Appeals rendered its opinion, which denied the petition for a writ of mandamus and also denied the government's interlocutory appeal.

REASONS FOR GRANTING THE PETITION

No case decided by this Court has dealt with the issue presented by this petition, i.e., whether an indictment against a Member of Congress which directly and explicitly charges him with the performance of a legislative act may be tried in a United States District Court; and whether the whole thrust of the Speech or Debate Clause may be blunted by permitting an indictment to proceed against a Senator or Representative regardless of its charges of legislative acts and limiting the effect of the Clause to a mere evidentiary restriction

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4/ As a result of the decision of this Court in Abney v. United States, 431 U.S. 651 (1977), petitioner could have proceeded on his issue by appeal to the Third Circuit instead of petition for mandamus, on the ground that the denial of a motion to dismiss the indictment was a final judgment of the inapplicability of the Speech or Debate Clause as a bar to the trial of this indictment. But Abney was not decided until after the time for appeal had expired. The petition for a writ of mandamus was filed one week after the decision in Abney.

as to what may be proved at the trial.

The two cases in this Court involving charges against federal legislators of bribery, United States v. Johnson, 383 U.S. 169 (1966), and United States v. Brewster, 408 U.S. 501 (1972), focused upon evidentiary considerations. The indictments in those cases carefully eschewed a charge of legislative acts.

The importance of Brewster and Johnson is their delineation of how far the executive may go in introducing evidence at a trial in a case against legislators charged with non-legislative acts. They make clear that the Clause confers immunity upon acts, not actors. Thus, in Johnson, a Congressman was charged with a corrupt effort to influence the actions of a branch of the executive - as non-legislative as a charge of bank fraud against a legislator. The Court read the Speech or Debate Clause to hold that even in such a situation - when the charge was of a non-legislative act - the government could not introduce any evidence of a legislative act. Such a holding was in accord with the historical function of legislative immunity which served to protect legislators from having their legislative acts questioned, no matter what the charge lodged against them. Johnson simply makes explicit what the Speech or Debate Clause implies: If a Member of Congress be prosecuted for non-legislative conduct, the proceedings must in the details of proof remain untainted by any incursion into "protected acts that cannot be shown in evidence," Brewster, supra, 408 U.S. at 528.

Brewster established that a Member of Congress may be charged with a criminal act related to the legislative process though not part of it, namely, the corrupt agreement to procure a legislative act, as long as no legislative act or motivation therefor is called into question. There the Court says, "[t]aking a bribe ... is not a legislative act," 408

U.S. at 526, and therefore a Member of Congress may be prosecuted for that non-legislative act, exactly as he could be prosecuted for any other non-legislative act. And in Brewster the Court reiterated what was said in Johnson, namely, that even if a Member of Congress is subject to prosecution because he is charged with a non-legislative act, there may still be no proof at trial of legislative acts.

Not for a moment did either Brewster or Johnson suggest that an indictment charging a legislative act may be entertained by a court and that the only force of the Speech or Debate Clause is to limit the evidence that may be introduced. The opinion of the Third Circuit in this case upholds exactly that process.

I.

A.

In order to preserve the independence of the legislative branch, the Framers gave to Congress exclusively the power to examine the legislative acts of its Members and the motivation therefor. It is clear that the jurisdiction of Congress over such inquiry excludes all other jurisdiction, for the Clause says "that for any Speech or Debate," Members of Congress "shall not be questioned in any other Place," Const., Art. I, Sec. 6. Thus, the Constitution itself establishes a firm rule of jurisdictional allocation.

In its most recent exploration of the boundaries of immunity, this Court reiterated that the judiciary must "read the Speech or Debate Clause broadly to effectuate its purpose," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975).

The Clause protects the widest range of legislative activity, and most certainly the introduction of legislation, as a "thing generally done in a

session of the House by one of its members in relation to the business before it," Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). No less than the acts themselves, the motivation for the acts is protected from inquiry, Johnson, supra, at 185. Thus, the charge that privileged activity is corruptly motivated may not be the basis for the prosecution of a Member of Congress. And it is no argument for a mitigation of immunity to say the Clause creates potential for abuse. In Eastland, this Court answered that contention by noting that "the risk of such abuse was the 'conscious choice of the Framers,' buttressed and justified by history." 421 U.S. at 510-11.

The principle that "for any Speech or Debate on the floor of either House, [Members]shall not be questioned in any other Place," means that legislators "should be protected not only from the consequences of litigation's result but from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

While the Clause also guards legislators from the loss of time and money involved in civil litigation, it was the executive which the Framers feared presented the major threat to legislative independence, not the private citizen. As the Court said, "[A] criminal prosecution infringes upon the independence which the Clause is designed to preserve." Eastland, supra, 421 U.S. at 503.

It is apparent, then, that the purpose of the Clause is prophylactic; it is designed to prevent the infection of the body politic which must arise from executive or judicial intrusion upon the actions of the representatives of the public.

B.

Plainly, the Speech or Debate Clause does not protect Members of Congress, as such; they are protected only to the extent they function in the

legislative sphere. As this Court said:

> The business of Congress is to legislate; Congressmen ... are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative immunity" [citation omitted], they enjoy no special immunity..." Doe v. McMillan, 412 U.S. 306, 324 (1973).

From the moment such a delineation is articulated, one must face the issue as to the meaning of the Speech or Debate Clause when the charge is of a non-legislative act, e.g., bank fraud, and when an effort is made to introduce at the trial proof of a legislative act as some supporting evidence thereof. Brewster and Johnson, both supra, relate to the evidentiary aspects of that issue at trial.

It turns those cases on their heads to say that they mean that the sole impact of the Speech or Dabate Clause is that it is an evidentiary rule, and that an indictment which specifically charges designated legislative acts may nevertheless be tried, and that the legislative acts of a Member of Congress may be called into question and the Member forced to answer to such an indictment. Such a holding flies in the face of Dombrowski and Eastland, both supra, and Powell v. McCormack, 395 U.S. 486 (1969), and exposes every legislator to the need to defend himself, whatever the charge, and to rely on the Speech or Debate Clause as a mere evidentiary protection instead of a jurisdictional prohibition. That is not what the Framers of the Constitution had in mind, nor is it consistent with what the foregoing cases hold.

Beyond that, such a view of the Speech or Debate Clause overlooks the historical development of that Clause. It has been at least 300 years since legislators have been prosecuted for the

specific offense of making a speech or introducing a bill in a legislative body. As pointed out by Mr. Justice Harlan, "historically seditious libel was the most frequent instrument for intimidating legislators [but] this has never been the sole form of legal proceedings so employed," Johnson, supra, 383 U.S. at 182. In the celebrated Strodes case referred to at that point in the opinion, the charge was violation of a law "making it an offense to obstruct tin mining." Id., n. 13. The evolution of the Speech or Debate Clause thus has been in the context of cases which charge non-legislative acts and the prosecution's effort to sustain its charge by proof of legislative acts.

But the fact that prosecutors have in other cases been careful not to charge legislative acts hardly means that when a prosecutor has done so, as in this case, the historic function of the Speech or Debate Clause is not effective to quash the charge itself.

C.

Where an indictment specifically charges a legislator with having committed legislative acts, then plainly, under the Speech or Debate Clause, he is not required to defend against it.

The indictment in this case of course does charge specific legislative acts. It identifies the very bills which the defendant introduced and embodies them in the charging part of the indictment. 5/

The contrast between the indictment here and in Brewster is sharp. In Brewster, it was clear that four of the five counts 6/ did not require inquiry

5/ See Indictment, Count I, infra, 2a; Count II, infra, 5a; Count III, infra, 5a-6a; Count IV, infra, 6a.

6/ Counts 1, 3, 5 and 7 charged he took money

[Continued on page 15.]

into "how [Brewster] spoke, how he debated, how he voted, or anything he did in the chamber or committee," 408 U.S. at 526, because the counts did not allege the performance of specific acts but rather referred to Brewster's action on "legislation which might at any time be pending" before Congress. The crux of the charge, in other words, was Brewster's agreement to do something, wholly unspecified, in the future. As to the fifth count in Brewster (Count 9), 7/ while it alleged a payment for an act already done, it did not specify the act and because of that the Court said:

> Inquiry into the legislative performance itself is not necessary [and] our holding in Johnson precludes any showing of how he acted, voted or decided. Brewster, 408 U.S. at 527.

Precisely because the indictment specified no acts, this Court pointed out that it was "unnecessary to inquire into the act, ... the legislative performance itself." Ibid.

The Brewster indictment scrupulously avoids specifying even the nature of the acts Brewster agreed to perform, referring instead to his "action, vote and decision on postage rate legislation which

[Footnote continued from page 14:]
"in return for being influenced in his performance of official acts in respect tohis action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity...," in violation of §201(c).

7/ Count 9 charged that he took money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity...," in violation of §201 (g).

might at any time be pending before him." What the legislation was, when it was pending before him, what action Brewster took are all carefully excluded from the indictment for once the legislative act is specified, the indictment's focus shifts from the agreement to the act. As the Court said: "The Government ... need not prove any specific act, speech, debate, or decision..." Brewster, 408 U.S. at 528; underscoring supplied.

For the Court of Appeals to say that the indictment here is not "materially distinguishable from that upheld" in Brewster (App. #78-349, 13a) is to ignore the specific and important differences which go to the heart of the constitutional allocation of jurisdiction as to charges that a legislator has improperly undertaken legislative acts. In the Helstoski indictment, those legislative acts are charged; in Brewster they were not.

Three Justices dissenting in Brewster expressed their view that even the indictment in that case should be taken as impermissible under the Speech or Debate Clause. See opinion of Mr. Justice White, 408 U.S. at 554. Certainly the instant indictment on its face cannot be allowed to continue as a basis for prosecution.

Johnson was charged with a conspiracy and seven substantive counts. There was no charge that he performed legislative acts. The charge was that he sought to influence the executive branch of the government, clearly not a legislative act. The making of a speech in Congress was noted merely as one overt act of the conspiracy. Although it did not hold that the entire conspiracy count, which charged Johnson with agreeing to use his influence in the Department of Justice, must be dismissed, the Court affirmed the lower court's decision prohibiting the government from using Johnson's speech - a legislative act - as evidence of non-legislative acts.

Since the conspiracy count of the Johnson indictment did not charge the performance of a legislative act but rather charged interference with the executive process, the mention of a legislative act as one of 45 overt acts could be dealt with by an evidentiary prohibition. Thus, the fact that the Court did not order the entire count dismissed stands only for the Court's recognition that the making of a speech on the floor of Congress was not part of the charge and that the indictment was not dependent upon prohibited inquiries. In fact, the Court held that "a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." Johnson, 383 U.S. at 185; emphasis supplied.

By contrast with Johnson, the conspiracy count in the instant case is, in fact, "dependent" upon inquiry into legislative acts, for in its charging portion it directly charges the defendant with their performance. The overt acts specifying the performance of legislative acts are thus not tangential to the conspiracy and easily excised, as in Johnson, but central to it, particularizing and illuminating the charge itself.

D.

The Court of Appeals did not deny that the indictment did specifically charge legislative acts. It simply held that,

> Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause,

those allegations may be ignored (App. #78-349, 15a).

But this misconceives the fundamental jurisdictional function of the Speech or Debate Clause.

The design of the Speech or Debate Clause is to maintain within the jurisdiction of Congress the policing and, if necessary, punishment of Members of the House of Representatives and Senators who misuse their powers. That grant of exclusive jurisdiction is as much violated by an indictment which charges legislative acts as by a trial which involves proof of them. Moreover, as this case so clearly reveals, the indictment itself can have the most devastating effect on the political life of a legislator - long before, and even if there never is, a trial. But U.S. Attorneys and grand juries are not supposed to take it upon themselves to level charges of legislative misconduct by U.S. Senators or Representatives. If they have evidence of unlawful conduct with respect to the performance of legislative acts, their proper course is to refer the matter to the appropriate committee of the Congress so that the House or Senate may act in respect to the jurisdiction which is vested in them by the Constitution. The situation is really not dissimilar to what U.S. Attorneys do - or at least should do - when they come across evidence of commission of a crime under state law and outside the jurisdiction of the federal courts. The simple point is that the Speech or Debate Clause is a jurisdictional limitation upon the executive as well as the judiciary. That jurisdictional limitation was breached by the course of conduct adopted by the U.S. Attorney before the grand jury proceedings and by the indictment.

The picture which emerges in this case is not a pretty one and does not speak well of the respect of the executive branch of the government for the principle of legislative independence. A Member of Congress appears voluntarily before a grand jury, gives testimony and submits evidence, without being told that he is the target of an investigation; later he and his records are subpoenaed, he asks

if he is a target and is told his question is "inappropriate."

After two years of exceedingly well-leaked and publicized grand jury proceedings, in which the names and testimony of witnesses appear with regularity in the press, the mass of testimony accumulated in hearings before eight grand juries is picked over and, stripped of material favorable to the Congressman but still encompassing evidence of his legislative acts, is presented, in a whirlwind period, to a ninth grand jury, along with live testimony of inculpatory witnesses only. And the whole process culminates in an indictment handed down one week before the primary election. The contempt which this entire proceeding bespeaks for the mandate of the Constitution, namely, that the executive must refrain from involvement in the affairs of the legislative branch, is all too apparent. And the ultimate evidence of what the executive did in this case is the language of the indictment.

E.

The very words of the indictment reveal not only that a trial would violate legislative immunity, but that legislative immunity was breached within the grand jury itself, for the indictment makes clear that within the grand jury and when the U.S. Attorney had in fact targetted a Congressman, the legislative acts of a Congressman were called into question.

The Framers were aware of the functioning of grand juries; they did not, however, write that Members of Congress shall not be questioned in any other place except by U.S. Attorneys or before a grand jury. Rather, they made the prohibition absolute: There was to be no point in the prosecutorial process at which legislative acts could be used to accuse their maker. Congress alone was given that power. The grand jury, whatever it

be - judicial instrument or tool of the prosecutor - is not legislative; it is no creature of Congress. Thus, for the prosecutor to call before the grand jury a Member of Congress as a target (not revealing that fact) to question him about his legislative acts, is to violate the Speech or Debate Clause, and for the grand jury to indict and charge legislative acts compounds the violation.

F.

The Circuit Court in its opinion framed the issue as to the validity of the indictment by reference to cases involving the use of constitutionally impermissible evidence before a grand jury. It decided that under United States v. Calandra, 414 U.S. 338 (1974), the indictment could be allowed to stand regardless of what evidence was heard (App. #78-349, 1a). But in Calandra the grand jury produced an indictment every allegation of which was within the jurisdiction of the court. Here the grand jury produced an indictment outside of its and the court's jurisdiction.

Beyond that, Calandra, turning as it does upon the Fourth Amendment and the function of the judge-made exclusionary rule, is very different from the instant case involving legislative immunity. The Framers did not say, There shall be Separation of Powers, and leave to the bench the fashioning of such a rule. Rather, the Framers insisted that the functional modes of Separation of Powers were themselves constitutional precepts and that no alternative means of maintaining this governmental structure were acceptable or feasible.

The Fourth Amendment exclusionary rule, on the other hand, was developed by the courts as a means of holding police and prosecutor to observance of the Constitution. Weeks v. United States, 232 U.S. 387, 392 (1913).

The Speech or Debate Clause is wholly different

from the exclusionary rule, for the Speech or Debate Clause itself gives effect to the Separation of Powers, as it relates to the protection of the legislature from other branches. It is not left to the judiciary to decide how best to insulate Congress from the executive and from itself; rather, the Framers fashioned, embodied and inserted into the Constitution their own exclusionary rule, an absolute and explicit principle, that "for any Speech or Debate on the Floor of either House, [Members] shall not be questioned in any other Place." It is thus irrelevant to cite Calandra as authority for the proposition that the Speech or Debate Clause is not operative before a grand jury - and that a grand jury may in its proceedings and by its indictment question a legislator.

G.

Furthermore, this is not a case where incompetent evidence was introduced inadvertently or amongst a great mass of other evidence accumulated during the investigative period, e.g., Costello v. United States, 350 U.S. 359 (1955). The findings of the District Court as to the structuring of the grand jury process make clear that the grand jury which handed down the indictment - the ninth grand jury to hear evidence in the case - was in fact presented only with that material culled from testimony before the eight previous grand juries which was most inculpatory of the defendant. "Selective presentation" (infra, 19a), which the District Court found was employed, ensured that the government could winnow out from its final presentation to the ninth grand jury material which it did not want that grand jury to see. Indeed, the material withheld from the indicting grand jury was precisely that which tended to exculpate the defendant (infra, 20a-22a).

As is clear from the face of the indictment,

evidence of legislative acts generated before the eight previous grand juries was not withheld from the indicting grand jury but was, in fact, deliberately put before that grand jury which had never subpoenaed it and, for that matter, had never heard live testimony from the Congressman, although he had appeared 10 times before other grand juries. Thus, when material offensive to the Speech or Debate Clause came before the indicting grand jury, it did so by virtue of a calculated maneuver by the government, not through inadvertence. Material presented to a grand jury by the defendant himself at a time when the government had not informed him he was targetted, material which because of the multiple grand juries employed by the government could, and should, have been kept from the indicting grand jury was instead deliberately laid before it as inculpatory of the defendant; as a direct consequence, the grand jury handed down an unconstitutional indictment.

The only possible justification, however remote, for this use of multiple grand juries would have been to insulate the final grand jury - the indicting grand jury - from hearing tainted or impermissible evidence. But the government, having sought out such evidence in the first place, compounded its disregard of constitutional principles by deliberately giving to the indicting grand jury precisely that material it ought never to have seen, namely, the evidence of defendant's performance of legislative acts.

II.

The Court of Appeals, having embarked on its view that allegations in the indictment of legislative acts were effectively surplusage, rejected the defendant's contention that the indictment was being amended, not only in violation of the Speech or

Debate Clause but as well in violation of the Fifth Amendment right to indictment by grand jury (App. #78-349, 16a-17a).

Ostensibly, the Circuit Court's action allowed a variance between the face of the indictment and the proofs to be offered at trial; in fact, it constituted a fundamental amendment of the indictment, by means of which the judicial branch would gain jurisdiction over the indictment. Implicitly, at least, the Circuit Court recognized the flawed and offensive nature of the indictment, for if the indictment comported with the requirements of the Constitution and did not call into question acts which only Congress may judge, it would not have been necessary for the Circuit Court to order the government not to prove elements of the indictment at trial.

But can such judicial action correct an indictment which is clearly unconstitutional? May an indictment which is offensive to the Speech or Debate Clause be handed down and made public and then amended so that, while facially it remains the same indictment under which a legislator is charged with acts for which he cannot be tried, in practice and at trial it is a different indictment, one which the District Court now has jurisdiction to try? If the court has no jurisdiction to try the petitioner for the alleged performance of acts for which he is answerable only to Congress, may it gain jurisdiction by the improper practice of constructive amendment? Obviously, the answer to these questions must be resoundingly negative. Ex parte Bain, 121 U.S. 1 (1887); Stirone v. United States, 361 U.S. 212 (1960); and Russell v. United States, 369 U.S. 749 (1962), clearly so hold.

In Bain the change made in the indictment by the trial court was the subtraction of several words from the charging portion of the indictment. This Court rejected the lower court's action:

> The opinion ... rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. Bain, supra, 121 U.S. at 9.

What Bain prohibits is exactly what the Circuit Court proposes here.

In the instant case, the face of the indictment demonstrates that the grand jury, having before it evidence of legislative acts, believed that a corrupt bargain had been struck, that defendant accepted certain sums of money in return for which he performed official acts, to wit, the introduction of specific private bills. It is possible - even likely - that if the grand jury had not been told that legislative acts were performed, it would have questioned whether the money had been accepted. While it need not and may not be proved at trial that the official act was performed in return for the money allegedly given, the grand jury showed that it considered both halves of the alleged bargain equally relevant, by including both in the substantive counts and in the conspiracy counts, in the critical charging portions as well as in the list of overt acts. There is thus great doubt whether the grand jury would have found Counts I-IV of the indictment had it not been deliberately appraised of the introduction of private bills.

Although the Court knows the grand jurors need not have included those paragraphs and phrases in order to charge an offense, the very fact that the grand jurors did so illustrates that proof of the performance of official acts weighed heavily with them.

In Bain, the indictment charged an "intent to deceive the Comptroller of the Currency and [his] agent." Bain, supra, at 4. The trial court struck the emphasized words. But this Court said:

> While it may seem to the court, with its better instructed mind ... that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive... How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? Id. at 10; emphasis supplied.

The principlesenunciated in Bain are fully supported in Stirone and Russell, both supra.

The constitutional defect in the indictment - the attack on defendant's immunity from prosecution - cannot be cured by depriving him of another, namely, the Fifth Amendment right to indictment by a grand jury and not by the court. Bain, ibid.

And here the proposed variance, amounting as it does to anamendment of the indictment, goes in its effect far beyond Bain, for in that case there was no question as to the constitutionality of the charges themselves nor any suggestion of immunity from prosecution of the defendant.

This case is not, as in Bain, simply a question of whether an indictment may be amended, preserving a defendant's right to grand jury indictment,

but whether an invalid indictment handed down by a grand jury alleging prohibited acts may be amended by the court to make it valid, though it is no longer the grand jury's indictment.

The Constitution gives to Congress alone the right to determine whether legislative misconduct has occurred. The U.S. Attorney, the grand jury, and the court have no such rights, at least in part because the destructive potential in such a right is too powerful a weapon to leave in the hands of any branch of government other than the legislative; it is a threat to the independence of the legislature. The power to remove disfavored legislators from Congress is precisely what the power to hand down such indictments and then amend them at trial amounts to. The charge that a legislator has corrupted the legislative process is the most serious that can be brought against him, for it bespeaks a betrayal of the public trust; it is virtually an automatic and disgraceful close to the career of a Member of Congress. 8/ The ability to effect the

8/ While any indictment of a Member of Congress has serious implications, the impact of the indictment in this case is of course greater precisely because it charges a legislative act, which means that the legislator has been charged with breach of his public trust. To be sure, such a charge would be equally devastating if it emerged from the House of Representatives. But the Speech or Debate Clause vested that power in the House because the Framers wished the Member's peers to weigh the facts before prosecuting the Member's legislative acts.

removal of a Member from the Congress by such a charge was thus left to the Congress alone, and was denied to the executive branch by the Framers.

Is it permissible for the executive to use the grand jury unconstitutionally to obtain an unconstitutional indictment, to intrude upon legislative immunity, and to publicize the offensive indictment and the charges against the defendant Member of Congress and effect his political defeat thereby, and for the judiciary subsequently to rescue the offensive indictment by means of amendment? What does this "hit and run" scenario leave of a legislator's right to be held accountable for his actions only by his colleagues and his constituents? What is left of Congress's jurisdiction over the alleged offenses of its Members? What, in short, is left of the "indispensable" mandate that a Member "be protected from the resentment of everyone, however powerful" whom his acts offend? 2 Works of James Wilson 421.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
Attorney for Petitioner

September 1978.

INDICTMENT (Filed June 2, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal
	:	No. 76-201
v.	:	Title 18, USC,
	:	Sections 201
HENRY HELSTOSKI	:	(c)(1), 371,
D. JOHN MAZELLA	:	1503, 1623 & 2
ALFRED A. PORRO and	:	
VINCENT L. VERDIRAMO	:	

The Grand Jury in and for the District of New Jersey, sitting in Newark, charges that:

COUNT I

1. At all times mentioned in this Indictment, the defendant, HENRY HELSTOSKI, presently residing at 56 Ridge Road, East Rutherford, New Jersey, was a United States Congressman representing the Ninth District of New Jersey and was a public official as that term is defined in Title 18, United States Code, Section 201(a).

2. From on or about January 1, 1966, through on or about December 31, 1968, the unindicted co-conspirator, Albert DeFalco, presently residing at 234 Harrison Avenue, Lodi, New Jersey, was an administrative aide to the defendant, HENRY HELSTOSKI, and subsequently represented himself to be an administrative aide to the defendant, HENRY HELSTOSKI, and acted on his behalf in immigration and other matters.

3. From at least as early as January 1, 1967, and continuing thereafter until on or about June 1, 1975, the exact dates being to the Grand Jury unknown, in the State and District of New Jersey,

and elsewhere, the defendant, HENRY HELSTOSKI, together with the unindicted co-conspirator, Albert DeFalco, and others, did knowingly, wilfully and unlawfully conspire, combine, confederate, and agree to violate the provisions of Title 18, United States Code, Section 201(c)(1) by directly and indirectly, corruptly asking, demanding, exacting, soliciting, seeking, accepting, receiving and agreeing to receive money for the defendant, HENRY HELSTOSKI, and for persons and entities acting on behalf of the defendant, HENRY HELSTOSKI, in return for the defendant, HENRY HELSTOSKI, being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendant, HENRY HELSTOSKI, committed and caused to be committed the following overt acts:

1. In or before August of 1967, at Newark, New Jersey, the unindicted co-conspirator, Albert DeFalco, met with Vincent J. Agresti, an attorney licensed to practice law in the State of New Jersey who specialized in immigration matters.

2. From in or about August of 1967 to in or about May of 1968, the defendant, HENRY HELSTOSKI, introduced private bills in the United States House of Representatives for clients of Vincent J. Agresti.

3. In or about May of 1968, in Newark, New Jersey, Vincent J. Agresti paid approximately $485, in cash, tothe unindicted co-conspirator, Albert DeFalco.

4. In or about August - September of 1968, in Paramus, New Jersey, the defendant, HENRY HELSTOSKI, met with Vincent J. Agresti and Amerigo D'Agostino, an attorney licensed to practice law in the State of New Jersey who

specialized in immigration matters.

5. In or about August - September of 1968, in Paramus, New Jersey, Vincent J. Agresti paid approximately $250, in cash, to the defendant, HENRY HELSTOSKI.

6. In or about December of 1968, in Newark, New Jersey, Vincent J. Agresti paid $500, in cash, for and on behalf of the defendant, HENRY HELSTOSKI.

7. In or about January - February of 1969, in Lodi, New Jersey, the defendant, HENRY HELSTOSKI, met with Vincent J. Agresti and Amerigo D'Agostino.

8. In or about January - February of 1969, in Newark, New Jersey, Vincent J. Agresti paid $500 in cash, for and on behalf of the defendant, HENRY HELSTOSKI.

9. On or about October 6, 1972, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, met with the unindicted co-conspirator, Albert DeFalco, and Ronald Blackwell.

10. On or about October 6, 1972, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, received approximately $5,000, in cash, and a $500 check.

11. On or about October 13, 1972, the defendant, HENRY HELSTOSKI, introduced private bills in the United States House of Representatives for Osvaldo Aguirre, Patrice Bergoeing, Raul Rojas, Hernan Milina and Alejandro Gonzalez and other members of their families.

12. On or about July 1, 1973, in Hawthorne, New Jersey, Luis and Maria Echavarria met with the unindicted co-conspirator, Albert DeFalco, and agreed to pay $1,500, in cash, for the introduction of a private bill in the United States House of Representatives by the defendant, HENRY HELSTOSKI.

13. On or about September 6, 1973, the defendant, HENRY HELSTOSKI, introduced a private bill in

the United States House of Representatives for Luis and Maria Echavarria.

14. On or about January 11, 1975, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, met with Maria Echavarria.

15. On or about January 18, 1975, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, met with Luis and Maria Echavarria.

16. On or about January 27, 1975, the defendant, HENRY HELSTOSKI, introduced a private bill in the United States House of Representatives for Luis and Maria Echavarria.

COUNT II

1. Paragraphs 1 and 2 of Count I of this Indictment are hereby realleged and incorporated as though set forth in full herein.

2. During the year 1972, Osvaldo Aguirre, Patrice Bergoeing, Hernan Molina, Raul Rojas and Alejandro Gonzalez were citizens of Chile, residing illegally in the United States, and were seeking to acquire legal permanent residence in the United States. During the same period Ronald Blackwell, an American citizen, sought to assist the said aliens in acquiring legal permanent residence.

3. During the months of September and October, 1972, in Paterson, New Jersey, and elsewhere, the defendant, HENRY HELSTOSKI, acting indirectly through Albert DeFalco corruptly asked, demanded, solicited, sought and agreed to receive cash payments from each of the aliens referred to in Paragraph 2 herein in return for the defendant, HENRY HELSTOSKI, being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on behalf of the aforesaid Chilean aliens and, thereafter, on or about October 6, 1972, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, corruptly accepted

and received, as a bribe, approximately $5,000 in cash, and $500, by check, in return for his being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on behalf of the aforesaid Chilean aliens, which private bills were introduced by the defendant, HENRY HELSTOSKI, on October 13, 1972.

In violation of Title 18, United States Code, Sections 201(c)(1) and (2).

COUNT III

1. Paragraphs 1 and 2 of Count I of this Indictment are hereby realleged and incorporated as though set forth in full herein.

2. During the years 1973 through 1975, Luis Echavarria and his wife, Maria Echavarria, were citizens of Argentina, residing illegally in the United States, and were seeking to acquire legal permanent residence in the United States.

3. In or about the month of July, 1973, in Hawthorne, New Jersey, the defendant, HENRY HELSTOSKI, acting indirectly through Albert DeFalco corruptly asked, demanded, solicited, sought and agreed to receive cash payments in the amount of $1,500 from Luis and Maria Echavarria in return for the defendant, HENRY HELSTOSKI, being influenced in the performance of an official act, to wit: the introduction of a private bill in the United States House of Representatives on behalf of Luis and Maria Echavarria and, thereafter, during the months of July through December, 1973, in Hawthorne, New Jersey, the defendant, HENRY HELSTOSKI, acting indirectly through Albert DeFalco, corruptly accepted and received, as a bribe, cash payments totaling $1,500 from Luis and Maria Echavarria in return for his being influenced in the performance of an official act, to wit: the introduction of a private bill in the United States House of Representatives on behalf of Luis and Maria

Echavarria, which private bill was introduced by the defendant, HENRY HELSTOSKI, on September 6, 1973.

In violation of Title 18, United States Code, Sections 201(c)(1) and (2).

COUNT IV

1. Paragraphs 1 and 2 of Count I and Paragraph 2 of Count III of this Indictment are hereby re-alleged and incorporated as though set forth in full herein.

2. In or about December, 1974, Maria Echavarria received a notice from the United States Immigration and Naturalization Service in Newark, New Jersey, instructing her to depart from the United States on January 8, 1975. After receiving said notice, Luis and Maria Echavarria sought the assistance of the defendant, HENRYHELSTOSKI, to prevent the deportation of Maria Echavarria.

3. From on or about January 11, 1975, to on or about January 18, 1975, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, directly and corruptly asked, demanded, solicited, sought and agreed to receive cash payments from Luis and Maria Echavarria in return for his being influenced in the performance of an official act, to wit: the introduction of a second private bill in the United States House of Representatives on behalf of Luis and Maria Echavarria, which private bill was introduced by the defendant, HENRY HELSTOSKI, on January 27, 1975.

In violation of Title 18, United States Code, Sections 201(c)(1) and (2).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1800

HENRY HELSTOSKI,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

HONORABLE H. CURTIS MEANOR,
United States District Judge,
Nominal Respondent

Present: Seitz, Chief Judge, Staley and Hunter, Circuit Judges.

Upon consideration of petitioner's application for a Writ of Mandamus/Prohibition, and the respondent's brief and answer in opposition thereto, and after hearing, it is O R D E R E D that petitioner's application for Writ of Mandamus/Prohibition be, and hereby is denied, in accordance with the opinion of this Court.

Costs taxed against petitioner.

ATTEST:

s/ Thomas F. Quinn
Clerk

Dated: April 13, 1978.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1800

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR,
NOMINAL RESPONDENT

(D.C. Crim. No. 76-201-1, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: June 30, 1978

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 76-201

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	OPINION
HENRY HELSTOSKI, et al., Defendants.	:	(dated February 24, 1977)

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
Attorney for Plaintiff
By: Bruce I. Goldstein, Esq.
Robert Beller, Esq.
Peter B. Bennett, Esq.
Assistant United States Attorneys

Morton Stavis, Esq.
Louise A. Halper, Esq.
Attorneys for Defendant Helstoski

MEANOR, District Judge.

The defendants have moved to dismiss the indictment, or in the alternative for an evidentiary hearing, because of alleged prosecutorial abuse of the grand jury process by the use of multiple grand juries.

In support of his motion, defendant Helstoski submitted an affidavit by Louise Halper, a member of the New Jersey bar, which sets out the results of her investigation into the number of grand juries which received evidence ultimately leading to the within indictment. That affidavit

avers that at least three grand juries took evidence in this case. Also submitted was an affidavit by Professor Bernard L. Segal of Golden Gate University, SanFrancisco, California, a member of the bar of the United States Supreme Court and the Commonwealth of Pennsylvania, which sets out the results of his investigation of the grand jury procedures employed in this District, and a survey of grand jury procedures employed in other districts around the United States. Professor Segal described the grand jury procedure in the District of New Jersey as follows:

> The grand jury procedures in this District are characterized by a unique utilization of multiple grand juries. Under this system, as many as seven regular grand juries exist simultaneously. A different grand jury sits on each week day. On each of two days a week, a second grand jury also sits. The grand juries are referred to by the Office of the Clerk of the District Court as 'The Monday Grand Jury,' 'The Tuesday Grad Jury,' etc. On the two days a week that two grand juries sit simultaneously the name of the foreperson of the grand jury is added tothe name of the day of the week to identify the grand jury.
>
> The practice of the United States Attorney is to present evidence to whichever grand jury happens to be sitting at the time that the prosecutor is ready to proceed in a given matter. In cases which require more than one day to present evidence, after the first day the evidence is frequently presented to a grand jury other than the one that heard the initial testimony. Under this procedure the grand jury which is asked to vote on an indictment frequently did not hear or see in person all the witnesses who gave grand jury testimony. And, the United States Attorney does not follow the practice of

> having read to the indicting grand jury all of the evidence that was presented to the grand juries who heard parts of the case.

In this survey, Professor Segal contacted 43 of the 94 District Courts of the United States, of those 43, 38 supplied information regarding their grand jury procedures. From this information, Segal concluded that the practice in this District "of fragmented presentation of evidence to multiple grand juries as a regular procedure in lengthy or complicated cases," and "the procedure used in this case of presenting to the indicting grand jury only selected portions of the evidence adduced before other grand juries that heard the same matter, ... is without precedent among other Federal Districts surveyed." 1/

At oral argument, defendants strongly urged that the multiple grand jury procedure described above undercut the essential protections afforded by their Fifth Amendment guarantee that they not be called "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." At that time, I stated that I could find no constitutional violation predicated on the mere showing that multiple grand juries had been employed in reaching the instant indictment. Since the Supreme Court's opinion in Costello v. United States, 350 U.S. 359 (1956), it has been beyond question that a grand jury indictment may be based on hearsay evidence. I further stated, however, my belief and concern that the use of

1/ I think Segal's latter conclusion is suspect as I find Segal's sworn statement that: "I have examined the transcript of the grand jury proceedings in the instant case." - to be incredible.

multiple grand juries presented a dangerous opportunity for prosecutorial abuse. The danger, as I then stated it, "is that the prosecutor will winnow and select his evidence that he has adduced previously before other grand juries and perhaps give the indicting grand jury, if an indictment is returned, a one-sided unfavorable view of the matter and not present to the indicting grand jury any explanatory or exculpatory matter." Tr., Dec. 23, 1976, at 33-34. The United States agreed that such danger existed. Id. at 34. I felt that an investigation was justified in order to determine whether the grand jury procedure had in fact been abused in this case. Mindful of the strong policy considerations underlying the secrecy of grand jury proceedings, Pittsburg Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959), I felt that, at least preliminarily, that investigation ought to be undertaken by the Court. I, therefore, ordered the United States to provide the Court with an affidavit indicating the number of grand juries employed in reaching the present indictment. I wanted to know their dates of empaneling and expiration. I asked for full transcripts of all testimony adduced before the other-than-indicting grand juries which was relevant to the instant indictment, and which was not presented to the indicting grand jury. I wanted to know whether the indicting grand jury had heard any live testimony, and the manner in which the testimony adduced before the other grand juries was presented to the indicting grand jury. I specifically wished to know if any summarizations of prior testimony had been given to the indicting grand jury. If the prior testimony of any witness had been presented only in part to the indicting grand jury, I wanted to know what was presented, and what was not. The United States then suggested that the Court could best resolve the question of the relevancy of the particular portions of testimony

which were not given to the indicting grand jury if the Court undertook to review the entire body of evidence which had been presented to the indicting grand jury. This the Court agreed to do. Review of the affidavit of the United States Attorney and all of the transcripts which have been submitted indicates the following:

The present indictment is the result of a protracted three-year investigation. Testimony relevant to the instant indictment was presented to nine separate grand juries during a period extending from 1974 to 1976. The indictment was ultimately voted on June 2, 1976 by a grand jury which was empaneled on September 17, 1975, and whose term has not yet expired. Of the other eight grand juries, five had expired after receiving testimony relevant to the subject matter of the instant indictment, and before June 2, 1976; the three remaining have not yet expired as of this date.

The indictment in this case was voted at the end of a concentrated five-day presentation of evidence on May 19, 20, 26, 27 and June 2, 1976 before the indicting grand jury. During this period, nine witnesses gave live testimony substantively relevant to the subject matter of the indictment. During this presentation, transcripts of the testimony of nine individuals who had testified before other grand juries were introduced. 2/ As a general rule, these transcripts were read in toto, verbatim, to the indicting grand jury. In a few cases, transcripts were reproduced for each member of the grand jury, and they were read individually by the jurors in toto. In one particular instance, where

2/ In a number of cases, where a particular witness had appeared more than once before various grand juries, several different transcripts from the same individual were introduced.

a witness had appeared twice before a non-indicting grand jury, excerpts from the transcripts of both appearances were read to the indicting grand jury, and copies of the entire transcript of the second - but not the first - appearance were distributed to the indicting grand jurors for their individual reading. 3/ There is no indication that any summarizations of prior testimony were presented to the indicting grand jury. Nor is there evidence that any members of the Office of the United States Attorney testified per se before the indicting grand jury. At least some of the testimony of some 37 individuals who had testified before prior grand juries was not presented to the indicting grand jury in any fashion.

I have reviewed all the testimony adduced before the indicting grand jury, and before the eight non-indicting grand juries. I have given special attention to the manner in which the evidence was set before the indicting grand jury, and the substantive content of the evidence which was not given to the indicting grand jury. On the basis of this review, I am unable to find an abuse of the grand jury process which warrants either the dismissal of this indictment, or any further investigation into this matter.

In so finding, I fully recognize, as has the Second Circuit in United States v. Esteppa, 471 F. 2d 1132 (2d Cir. 1972), that when the framers of the Bill of Rights adopted the grand jury indictment requirement of the Fifth Amendment, "they were not engaging in mere verbal exercise." Id. at

3/ This had the effect of exposing the indicting grand jury to the entirety of the witness' second testimony. As to the first testimony, the grand jurors were exposed only to those passages which had been read tothem.

1136. The Supreme Court has pointed out that the purpose of this requirement is to palce an independent body between the prosecutor and the accused, which can evaluate evidence, and determine if a criminal charge is based upon reason. Wood v. Georgia, 370 U.S. 375, 390 (1962); Stirone v. United States, 361 U.S. 212, 218 (1960). The Court, however, in Costello v. United States, 350 U.S. 359 (1956), has made it clear that "an indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Id. at 363. Because the purpose of the grand jury is to investigate possible wrongdoing - and not to determine guilt or innocence - the Supreme Court has declined to apply to the grand jury process those rules which are designed to assure a fair trial. Therefore, my intention in going behind the present indictment was solely to determine whether there was any basis on which to contend that the prosecutor had manipulated the multiple grand jury procedure employed in this case so as to utterly compromise the independent judgment of the indicting grand jury.

Prior case law has offered little guidance in the establishment of appropriate standards of procedure in cases where multiple grand juries have been employed. Presumably, this is because the use of multiple grand juries as a matter of routine is rather unique to this District.

There are a few cases which have dealt with this question to some extent.

In one case, where the Government sought an indictment on the basis of transcripts of testimony before a prior grand jury, the District of Connecticut held that the Fifth Amendment had not been satisfied where the prosecutor (1) failed to enlighten the grand jury of the hearsay nature of the evidence it was receiving; (2) failed to alert the grand jury

that the transcripts upon which it was to base an indictment were permeated with perjurious statements, and (3) failed to supply the grand jury with the full and complete record of the proceedings before the first grand jury. United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

In another case, where the District of Maryland entered an order under F.R.Cr.P. 6(e) allowing certain transcripts of testimony before its grand jury to be released for submission to a California grand jury, the court stated:

> [I]f any part of the testimony of a witness is to be read to another grand jury, the entire testimony of that witness should be read to the grand jury; and ... [the Government] should not be permitted to disclose in the form of summaries, however carefully prepared, selected portions of the testimony given before the [first grand jury].

In re Grand Jury Investigation of the Banana Industry, 214 F. Supp. 856 (D. Md. 1963).

In United States v. Verdiramo, Crim. No. 75-221 (D.N.J. 1975), Judge Frederick B. Lacey of this court dismissed an indictment where the prosecutor gave an oral summary of the testimony a witness had given before a prior grand jury to a second grand jury. Judge Lacey felt obliged to dismiss the indictment returned by the second grand jury even though a transcript of the prior testimony was left with the jurors for their perusal.

These cases rather uniformly establish the proposition that the prosecutor may not present the substantive content of prior grand jury testimony to a subsequent grand jury in words of his own choosing. Actual transcripts of prior testimony must be presented to the grand jury - either by having them read to the grand jurors, or by placing copies of the testimony in the hands of the jurors

for their own perusal. Nor may the prosecutor alter the substantive content of a prior witness' testimony by presenting a transcript which has been excerpted. My review of the record before the indicting grand jury reveals no instances where the Government presented prior grand jury testimony in a manner other than through transcripts of that testimony. In cases where a given witness' testimony was excerpted, the omitted material was of a legal - not substantive - nature. For example, invocations of the Fifth Amendment testimonial privilege were not presented to the indicting grand jury. In the single case where matter of a substantive nature was omitted from a transcript which was introduced, that matter was either duplicative of other testimony of the same witness which was given to the indicting grand jury, or it was matter which was not particularly probative of the subject matter of the instant indictment.

There is, of course, still a question regarding the omission of certain prior testimony in toto. I am of the opinion that in the context of a case such as this, involving a grand jury investigation lasting over two years, the prosecutor ought properly be vested with a measure of discretion as to what prior testimony should be presented to a grand jury from which he seeks an indictment. There has never existed a requirement that the prosecutor place before a grand jury the totality of the evidence within his grasp. The prosecutor is not obligated to produce before the grand jury evidence which tends to undermine his own case. Jack v. United States, 309 F. 2d 522 (9th Cir. 1969); Loraine v. United States, 396 F. 2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968); United States v. Addonizio, 313 F. Supp. 486, 495 (D. N.J. 1970), aff'd, 451 F. 2d 49 (3d Cir. 1972). In my mind, however, there are circumstances in

which a prosecutor's selective presentation of prior grand jury testimony may constitute a deprivation of due process. A prosecutor may not engage in conduct which invades the province of the grand jury or tends to induce actions other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them. State v. Joao, 53 Haw. 226, 228-29, 491 P. 2d 1089, 1091 (1971); Commonwealth v. Favulli, 352 Mass. 95, 224 N.E. 2d 422, 430 (1967). I believe such conduct exists where a prosecutor seeking an indictment willfully disregards an overwhelming presentation of exonerating testimony before one grand jury, and sets before a subsequent grand jury only those tidbits of incriminating testimony that he is able to cull from the prior presentation. I think such conduct operates a fraud on the grand jury, and destroys its independent ability to evaluate the quality of the Government's case. On the grand jury record before me, however, I am unable to conclude that there is a basis to say that the prosecutor has abused the grand jury process in this manner.

I can find no venal purpose underlying the method by which the Government sought the return of this indictment. Defense counsel is aware that in December 1975 legal issues arose concerning the manner in which defendant Helstoski asserted certain constitutional privileges before the grand jury at which he had been called to testify. Indeed, counsel has moved to dismiss this indictment on the grounds that those issues were erroneously resolved. The Government's averred purpose in re-presenting its case to the grand jury which returned this indictment was to moot those legal issues by securing an indictment not tainted by the legal dispute. In order to obtain this result, it was obligatory that the Government exercise some selectivity in making its presentation. Those

transcripts of prior testimony which contained references to the legal dispute, and which contained invocations of the Fifth Amendment after the dispute, were properly deleted from the presentation to the indicting grand jury. At the same time, transcripts of testimony only peripherally relevant to the subject matter of the grand jury's deliberations were also omitted. Frankly, the preponderance of the omitted material was either prejudicial to the defendants, or neither inculpating nor exculpating in nature. While I do have reservations concerning the omission of certain testimony that did not go to the indicting grand jury, and that shall be addressed in a moment, I must conclude, on the basis of the grand jury record which I have reviewed, and all the circumstances surrounding the return of the instant indictment, that the independent deliberation of the indicting grand jury was not so compromised by the prosecutor's selective presentation, as to require the dismissal of this indictment. Defendants' motions are, therefore, denied.

As noted above, my denial of defendants' motions is not to be read as complete satisfaction with the Government's presentation to the indicting grand jury.

1. On the first day of the formal presentation to the indicting grand jury, the United States Attorney advised the jurors that although the Government originally intended to seek an indictment from the Friday grand jury then empaneled, because that grand jury had heard the most live testimony, a certain legal problem had arisen which made it inappropriate to present the case to that grand jury. The indicting grand jury was assured: "We intend to present to you all the evidence heretofore presented - and we intend to present to you the testimony live of all the key witnesses and all witnesses which you believe you should hear from - as well as the complete verbatim transcripts of

all matters that have been before the Friday, or any other, grand jury, that relates tothis case." Tr., May 19, 1976, at 4. Whatever the Government's intention at that time, it is clear that the indicting grand jury was not presented with "all the evidence heretofore presented." Nor is it apparent that the indicting grand jury was ever disabused of the notion that it in fact had heard or read all the testimony which had been adduced before the prior grand juries. This was not only wrong, but served to magnify the significance of the omission of certain exonerating evidence from the presentation - evidence whose omission I also find questionable.

2. The central allegations of the first four counts of the instant indictment charge defendant Helstoski with the receipt of bribes in return for his introduction of certain private immigration bill s in the House of Representatives. From the records made in other cases arising out of this grand jury investigation, I think it is firmly established that certain illegal aliens did in fact "purchase" private immigration bills from a "connection" with the House of Representatives. The gravamen of the Government's proofs in this case will be to demonstrate that the "connection" included defendant Helstoski. Helstoski testified before the grand jury that he simply was not part of the connection, i.e., that it did not reach him. He testified that when he learned that aliens purportedly had "purchased" private bills from him, he called them together in his office and told them to go to the FBI. Helstoski's testimony to this effect went to the indicting grand jury. By my count, the testimony of five aliens, who had purchased bills through the connection, corroborated Helstoski's story concerning the FBI, before non-indicting grand juries. Their testimony was not given to the indicting grand jury. It should have been.

I recognize it could be argued that this evidence

was damaging to Helstoski. Purportedly, he was dealing with aliens illegally present in the United States. They would be unlikely to approach law enforcement, and, in view of this it would be said Helstoski should himself have made a report to the FBI. It seems to me, however, that the impact of this evidence was for the judgment of the grand jury and not the Government. I also view this evidence of corroboration of Helstoski's testimony that he instructed the aliens to report to the FBI as Brady material, Brady v. Maryland, 373 U.S. 83 (1963); United States v. McCrane, 527 F. 2d 906 (3rd Cir. 1975), vacated and remanded, 96 S. Ct. 3197 (1976), after remand, ____ F. 2d ____ (3d Cir. 1976), and I have already ordered the Government to divulge it to him.

3. One Carlos DeLaFuente testified before one of the non-indicting grand juries. His testimony indicated that he was an eyewitness to an alleged $1,500 cash payoff by Luis Echavarria to someone whose physical description matches that of defendant Helstoski. DeLaFuente had sold a business to Echavarria and his wife. He testified that he, the Echavarrias and certain attorneys concocted a scheme to make it appear that the Echavarrias had invested $10,000 in this business when in fact they had not. The existence of such an investment would accrue to the benefit of the Echavarrias in their quest to obtain permanent residence in the United States. The Echavarrias are probably important Government witnesses. They were among the few illegal aliens who actually made live appearances before the indicting grand jury. The DeLaFuente testimony is corroborated by that of an attorney, David L. Siegel, who represented DeLaFuente in the sale to the Echavarrias. The position of Maria Echavarria was that the payment of the $10,000 in question to DeLaFuente actually took place. Neither DeLaFuente's testimony nor that of Siegel

was presented to the indicting grand jury. That portion of Maria Echavarria's testimony that dealt with the alleged $10,000 investment also was not presented to the indicting grand jury. In the transcripts of grand jury testimony that have been supplied to me, there is no mention by either Luis or Maria Echavarria of the alleged $1,500 cash payoff to a man answering Helstoski's description.

While Helstoski has no cause for complaint about the failure to place the DeLaFuente testimony concerning the alleged $1,500 cash payoff before the indicding grand jury, in my opinion the story of the alleged $10,000 investment should have been presented. If true, this tale reflects on the testimonial credibility of the Echavarrias and indicates that they may well have been willing to engage in criminal conduct to remain in the United States. The assessment of this evidence was for the judgment of the grand jury. I view the DeLaFuente story of the false $10,000 investment as Brady material, and have already ordered the Government to divulge it.

In order to place these latter observations in perspective, I reiterate that the use of multiple grand juries in seeking an indictment is a procedure that holds forth a high potential for prosecutorial abuse. However, before an indictment will be dismissed on that ground, the record must show that there has been a compromise of the independent ability of the grand jury to perform its constitutional duty. On the record before me, I see no basis for contending that this standard has been met, and, hence, no basis for further inquiry into the matter. Therefore, the motion of the defendants for dismissal of the indictment because of abuse of the grand jury process, or in the alternative for an evidentiary hearing, is denied.

The United States should submit an appropriate order.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1800

HENRY HELSTOSKI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

HONORABLE H. CURTIS MEANOR,
Nominal Respondent

Present: ADAMS, VAN DUSEN and GIBBONS,
Circuit Judges.

At the specific direction of the Court, it is O R D E R E D that respondent, and nominal respondent if he so desires, file and serve an answer to the petition for writ of mandamus/prohibition, original and three copies in legible typewritten form, in the above-entitled case, not later than July 5, 1977; and

It is Further O R D E R E D that petitioner file and serve his brief, original and six copies, and the appendix, original and three copies, not later than July 19, 1977; and

It is Further O R D E R E D that respondent, and nominal respondent, if he so desires, file and serve brief(s), original and six copies, not later than August 16, 1977; and

It is Further O R D E R E D that petitioner, if he so desires, file and serve reply brief, original and six copies, not later than August 23, 1977; and

It is Further O R D E R E D that this case be listed for disposition on the merits at the earliest convenience of the Court.

For the Court,

Dated: 6/21/77. s/ T. F. Quinn, Clerk

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-546

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY HELSTOSKI, PETITIONER

v.

HONORABLE H. CURTIS MEANOR, UNITED STATES DISTRICT JUDGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 576 F. 2d 511. The opinions of the district court (Pet. App. 9a-22a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1978. Petitions for rehearing were denied on June 30, 1978. The petition for a writ of certiorari was filed on September 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201(c), is

invalid because it contains references to legislative acts that are not themselves punishable due to the Speech or Debate Clause.

2. Whether consideration by the grand jury of evidence showing legislative acts deprives the district court of jurisdiction to try an indictment alleging a violation of 18 U.S.C. 201(c).

3. Whether the district court's restriction of the government's proof at trial to prevent references to legislative acts constitutes a constructive amendment of the indictment.

STATEMENT

Petitioner Helstoski, a former member of Congress, was indicted in the United States District Court for the District of New Jersey on three substantive counts and one conspiracy count alleging violations of the official bribery statute, 18 U.S.C. 201(c). The indictment charged that petitioner had acted with others to solicit and receive bribes in return for being influenced in the performance of his official duties. Petitioner's motion to dismiss these counts was denied, and he then unsuccessfully petitioned the court of appeals for a writ of mandamus to prevent trial on the indictment (576 F. 2d 511, 515-520).[1]

The procedural and factual background of petitioner's indictment are set forth in our petition for certiorari (78-349 Pet. 3-9) and in the opinion of the court of appeals (78-349 Pet. App. 2a-9a). Briefly, the indictment charged petitioner with having solicited and received bribes in return for the introduction of private immigration bills on behalf of specified aliens residing illegally in the United States (*id.* at 2a-6a). Petitioner appeared before investigating grand juries on ten occasions and voluntarily testified about his introduction of the private immigration

[1]The opinion of the court of appeals is set forth in the Appendix to the United States' petition for a writ of certiorari in this case (78-349 Pet. App. 1a-33a).

bills; he also provided the grand juries with copies of the bills and related correspondence (*id.* at 5a). Petitioner subsequently challenged the indictment as violative of his rights under the Speech or Debate Clause. The district court denied his motion to dismiss the indictment, but it restricted the scope of the government's proof at trial to exclude all evidence of the past performance of a legislative act.[2]

In denying petitioner's mandamus petition, the court of appeals concluded that this Court's decision in *United States* v. *Brewster*, 408 U.S. 501 (1972), "compels the conclusion that the indictment in the case before us does not violate the Speech or Debate Clause" (78-349 Pet. App. 15a; see also *id.* at 12a-14a). The court below also rejected the claim that the restriction of the government's proof had the effect of amending the indictment, and it held that the grand jury's consideration of evidence referring to legislative acts did not deprive the district court of jurisdiction to try the indictment (*id.* at 15a-21a).

ARGUMENT

As in his mandamus petition in the court of appeals, petitioner here argues (Pet. 9-27) that the present indictment is barred by the Speech or Debate Clause. As we demonstrate hereinafter, that claim is insubstantial and review of it by this Court is unwarranted.

We emphasize at the outset the procedural posture of this petition. It seeks review by this Court of the discretionary denial by the court of appeals of the petition for mandamus, which petition challenged an interlocutory order of the trial court denying a motion to dismiss. Mandamus is traditionally limited, *inter alia*, to cases in which the petitioner shows that he has no other available remedy and that his right to relief is "clear and indisputable." *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976); *Will* v. *Calvert Fire Insurance*

[2]The scope of the evidence permitted by the Speech or Debate Clause is the subject of our petition for certiorari in No. 78-349.

Co., No. 77-693 (June 23, 1978), slip op. 6. Petitioner can make no such showing here for he may again present his claims to the court of appeals upon appeal from a final judgment of conviction—if in fact he is convicted.[3] Here, as in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26-27 (1943), the "objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear" should be raised on direct appeal because mandamus "may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute."

1. Petitioner contends (Pet. 9-19) that his indictment should be dismissed (a) because the Speech or Debate Clause vests Congress with exclusive jurisdiction over bribery charges relating to the legislative process, and (b) because the instant indictment goes beyond that approved by the Court in *United States* v. *Brewster*, 408 U.S. 501 (1972).

a. Petitioner's jurisdictional argument is fully answered by *Brewster*, which affirmed the power of the Executive to investigate and prosecute and the Judiciary to punish (pursuant to statute) bribery of members of Congress in cases such as this. As the Court pointed out, while the Speech or Debate Clause guarantees the functional independence of individual Congressmen, it does not "make members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.[4]

b. Contrary to petitioner's assertion, the instant indictment does not differ materially from the indictment upheld in *Brewster*. The indictment in *Brewster* charged

[3]In contrast, there will be no way to review the evidentiary limitation placed on the government's proof by the courts below unless our petition in No. 78-349 is granted. Congress has authorized immediate review of such limitations under 18 U.S.C. 3731, as the court below recognized (78-349 Pet. App. 22a-25a).

[4]The effect of this contention, if sustained, would apparently be to make former members of Congress, such as petitioner, wholly immune from any sanction for criminal misconduct.

that the defendant had accepted a bribe "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." 408 U.S. at 503. Thus, the indictment charged the defendant with having accepted funds for the performance of specified past legislative acts. Although the indictment in the present case contains somewhat more detail (see Pet. App. 1a-6a), it too alleges the solicitation and receipt of money for such legislative acts. As in *Brewster*, the mere reference to past legislative acts does not serve to bar trial of the indictment. This Court's reasoning in *Brewster*—that any improper allegation of legislative acts was mere surplusage and not a material element of the indictment—was correctly applied by the court below (see 408 U.S. at 527):

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

As *Brewster* emphasizes, the material elements of a Section 201(c) offense do not require direct proof of the Congressman's legislative performance (*id.* at 526). Thus, the court below correctly concluded that because the instant indictment "charge[s] a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause, [petitioner] has not made sufficient showing to justify issuance of the writ he seeks on Speech or Debate grounds" (78-349 Pet. App. 15a).

2. Petitioner further argues (Pet. 19-22) that even though he voluntarily testified before the grand jury and

produced documents without raising a Speech or Debate Clause objection, it was improper for the grand jury to "question a legislator" or consider evidence referring to his legislative acts. He does not contest in this connection the conclusion of both courts below that the indictment charges an offense under 18 U.S.C. 201(c); rather, he contends that consideration by the grand jury of evidence showing legislative acts deprives the district court of jurisdiction to try the indictment.

It is well settled, however, that an indictment that charges an offense and is returned by a legally constituted grand jury "is enough to call for a trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956); see also *United States* v. *Calandra*, 414 U.S. 338 (1974). This principle, intended to prevent protracted litigation over the competence of evidence reviewed by the grand jury, applies fully to claims based on the Speech or Debate Clause. In *United States* v. *Johnson*, 383 U.S. 169 (1966), this Court permitted retrial even though it was clear from the specification of a legislative act in the indictment that the grand jury had heard evidence referring to the legislative act. On appeal after retrial, the court of appeals rejected the argument that the indictment was invalid because of the presentation of evidence of legislative acts to the grand jury. *United States* v. *Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969). This Court subsequently denied the Congressman's petition for certiorari. 397 U.S. 1010 (1970). The instant petition for certiorari cites no authority that would support a contrary disposition of this claim here.

3. Petitioner further contends (Pet. 22-27) that the restriction by the courts below of the government's evidence had the effect of amending the indictment, contrary to *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Ex parte Bain*, 121 U.S. 1 (1887). While we maintain that the restriction of the government's evidence was improper, petitioner's claim of constructive amendment is groundless in any event.

The decision below did not alter the indictment returned by the grand jury; it merely limited the government's proof and treated certain statements in the indictment as surplusage. Neither *Bain* nor *Stirone* prevents federal courts from disregarding or striking surplusage in an indictment. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Watson* v. *Jago*, 558 F. 2d 330, 333 (6th Cir. 1977); *United States* v. *Hall*, 536 F. 2d 313, 319 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Dawson*, 516 F. 2d 796, 801 (9th Cir.), cert. denied, 423 U.S. 855 (1975).

The critical question is whether the essential elements of the crime charged in the indictment are the same elements to be proved by the government at trial. *United States* v. *Somers*, 496 F. 2d 723, 744 (3d Cir.), cert. denied, 419 U.S. 832 (1974); *United States* v. *Silverman*, 430 F. 2d 106, 111 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). That requirement is satisfied here. The decision below merely confines the government to proof of the material allegations charged in the indictment returned by the grand jury. Even assuming that the government should not be permitted to present evidence referring to past legislative acts, the unnecessary allegation of such acts in the indictment is properly disregarded as surplusage, as *United States* v. *Brewster, supra*, 408 U.S. at 527, squarely holds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1978

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